

STATE OF MICHIGAN
IN THE SUPREME COURT

STAND UP FOR DEMOCRACY,
Plaintiff-Appellee,

v

Supreme Court No. 145387

BOARD OF STATE CANVASSERS,
RUTH JOHNSON, in her official capacity as
Secretary of State for the State of Michigan,

COA No. 310047

Defendant,

CITIZENS FOR FISCAL RESPONSIBILITY,
Intervening Defendant-Appellant

**BRIEF FOR MICHIGAN CENTER FOR ELECTION LAW
AS AMICUS CURIAE IN OPPOSITION TO APPEAL**

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STATEMENT OF FACTS AND QUESTIONS PRESENTED

Amicus Curiae adopts and incorporates by reference the Statement of Questions presented and the responses as framed and presented by the Plaintiff-Appellee. Amicus Curiae also adopts and incorporates by reference the facts as presented by Plaintiff-Appellee.

INTERESTS OF AMICUS CURIAE

Amicus Curiae is a nonpartisan nonprofit corporation dedicated to enhancing the balanced implementation of election law, strengthening our democratic institutions and encouraging citizens to be active in civic life. Amicus Curiae has an interest in this Court's consideration of the doctrinal, constitutional, and policy issues involved in this case. Of particular interest is the impact that the Court's interpretation of MCL 168.482(2) will have on the rights afforded to the citizens of Michigan under the First and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT

I. A DEPARTURE FROM THE "SUBSTANTIAL COMPLIANCE" DOCTRINE PLACES AN UNDUE RESTRICTION ON CORE POLITICAL SPEECH WITHOUT ANY COMPELLING JUSTIFICATION.

Plaintiffs' effort to express their political voice via the state-sanctioned ballot initiative process is protected under the First Amendment of the United States Constitution. US Const Amend 1. A departure from the substantial compliance standard, as defendants urge the court to consider, will not survive the exacting scrutiny of the First Amendment.

Citizens' circulation of an initiative petition is considered "core political speech" under the First Amendment.¹ See, e.g., *Meyer v Grant*, 486 US 414, 421-25 (1988), *Buckley v Am Constitutional Law Found*, 525 US 182, 186-87 (1999).

In that regard, any restrictions on "the discussion of political policy ... or advocacy of the passage or defeat of legislation" are "wholly at odds with the guarantees of the First Amendment." *Buckley v Valeo* 424 US 1, 48 (1976). Indeed, the United States Supreme Court has held that any state restrictions of ballot initiative efforts "trenches upon an area in which the importance of First Amendment protections [are] 'at its zenith.'" *Meyer* at 425. See also *First Nat'l Bank v Bellotti*, 435 US 765, 777 n11 (1978) (Freedom of expression has particular significance with respect to government because "[it] is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." Citing T. Emerson, *Toward a General Theory of the First Amendment* 9 (1966).)

As such, any efforts from the state to "limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed." *Meyer* at 423 (citing *Urevich v Woodard*, 667 P2d 760, 763 (Colo 1983)).

In *Meyer*, the Supreme Court found that a law banning compensation for petition circulators restricted political expression in part because the law made it "less likely" that citizens would be able "to place the matter on the ballot, thus limiting their ability to make the matter focus of statewide discussion." *Meyer* at 423. Similarly, here, this Court is asked to

¹ The First Amendment is applicable to the states through the Fourteenth Amendment. *Meyer v Grant*, 486 US 414, 420 (1988).

consider a change to a longstanding standard that will, if adopted, make it “less likely” that citizens in Michigan will be able to successfully circulate ballot initiatives and referenda.

Michigan citizens possess the “power to approve or reject laws enacted by the legislature,” under the Michigan Constitution. Const 1963, art 2, § 9. The state constitution also provides that “[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.” Const 1963, art 12, § 2. The law at issue in this case provides that headings on proposed legislative referendums “shall be prepared in the following form and printed in capital letters in 14-point boldfaced type.” MCL 168.482(2).

The lower court correctly noted that plaintiff’s effort to develop and circulate a referendum petition was in substantial compliance with state legal requirements. Under the “substantial compliance” doctrine, “all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote and express their will on any proposal subject to election.” *Meridian Charter Twp v East Lansing*, 101 Mich App 805, 810 (1980); see also *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1 (2002). Interpreting this statute in such a way ensures that the state’s administrative restrictions on the initiative process are not implemented in such a way as to offend the protections of the First Amendment.

A departure from the substantial compliance standard for a more narrow interpretation of the statute, however, will impose a new restriction on citizens’ right to political expression without any compelling justification.

Defendants and interveners do not offer any significant or compelling justification to support a necessary departure from this long established standard. The brief from the interveners

describes the reason behind the departure solely as to ensure that “A person signing a petition seeking a referendum of legislation is agreeing to only one thing: that he or she wants the legislation identified to be repealed.” Intervening Defendant Citizens for Fiscal Responsibility’s Application for Leave to Appeal at 3.

There is no evidence in the record that citizens were unable to comprehend the impact of their signature with plaintiff’s petition header printed in Microsoft’s 14-point Calibri font. The font was printed in bold, virtually indistinguishable from the 14-point type the defendants suggest, and clearly communicated the impact of the citizen’s signature. There is no evidence that any citizens were unable to read the petitions in the form provided.

Further, unlike previous recent efforts to collect signatures that were certified by the State Board of Canvassers, there is no evidence to suggest that any voter who signed the petition was misled about the content or meaning of the referendum. *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506 (2005), *Operation Kings Dream v Connerly*, 501 F3d 584 (CA6 2007).

II. A DEPARTURE FROM THE “SUBSTANTIAL COMPLIANCE” DOCTRINE CREATES AN UNCONSTITUTIONAL “CHILLING EFFECT” ON CORE POLITICAL SPEECH FOR MICHIGAN CITIZENS.

Departing from the substantial compliance standard will also have a chilling effect on the First Amendment rights of Michigan citizens, in general, and the decision to exercise those rights through the ballot initiative process, in particular.

State actions have been found to have an unconstitutional “chilling effect” when they deter or unduly discourage individuals from expressing speech otherwise protected under the First Amendment. See, e.g., *Buckley v Am Constitutional Law Found*, 525 US 182, 221 (1999),

Dombrowski v Pfister, 380 US 479, 486 (1965). To establish a First Amendment violation in this regard, a plaintiff need not have been actually injured. Rather, the plaintiff needs only to establish that he wishes to engage in arguably protected speech, but that he is discouraged or “chilled” from doing so by the existence of the statute. Self-censorship can itself constitute injury in fact. *See Virginia v Am Booksellers Ass’n*, 484 US 383, 393 (1988).

Were the court to overturn the current “substantial compliance” standard, Michigan citizens will know that even if they substantially comply with the requirement in MCL 168.482(2) and work with a printer to produce petitions with a heading in 14 point font, the state will not certify the petitions unless they meet a specific measurement formula that defendants suggest. It would also mean that any group of citizens wishing to exercise their political rights under the First Amendment would bear the additional burden of needing to hire an expert to measure each letter of the petition to ensure it complies strictly with what defendants contend is the legal requirement.

Such a high bar for certification is a significant departure from the current accessible standard that enables any citizen with access to a computer to create petitions in a 14 point font. And it will discourage and deter citizens from exercising their democratic right to engage in the initiative process.

If the Court upholds this process it is also creating an ephemeral standard that will undoubtedly deter future petitioners seeking to comply with the law. While the substantial compliance standard currently mandates that all discrepancies be resolved with a light towards protecting the constitutional rights of the citizens presenting the petition, a departure from that standard will enable a haphazard approach, creating and endorsing an ability for the 4-member state Board of Canvassers to define and redefine the meaning of “14 point type.” Such an

authority provides little guidance, but much discouragement, to petitioners seeking to exercise their First Amendment right and state constitutional right of petition.

CONCLUSION

Amicus Curiae Michigan Center for Election Law believes that substantial compliance with the 14-point type requirement in § 482(2) is sufficient to give plaintiff a clear legal right to certification of the petition, in part because an alternative finding will violate the central tenets of the First Amendment of the United States Constitution. Therefore, Amicus Curiae Michigan Center for Election Law respectfully requests that this court affirm the judgment of the Court of Appeals.

Respectfully submitted,



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